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No. 89-1399

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In The

# Supreme Court of the United States

October Term, 1989

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, ET AL.,

*Petitioners,*

v.

ROBIN GEORGE AND MARCIA GEORGE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Fourth Appellate District**

## REPLY BRIEF FOR PETITIONERS

MICHAEL W. MCCONNELL
*Counsel of Record*
ANDREW L. FREY
THOMAS C. BERG
MAYER, BROWN & PLATT
190 S. La Salle St.
Chicago, IL 60603
(312) 701-7201

EDWARD MCGLYNN GAFFNEY, JR.
1149 S. La Jolla Ave.
Los Angeles, CA 90035
(213) 934-8307

DAVID LIBERMAN
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
(213) 277-9288

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## REPLY BRIEF FOR PETITIONERS

This case involves a multi-million dollar tort judgment against a small and unconventional religious group for emotional injuries allegedly suffered by the parents of a former member as a result of her conversion, her decision to run away from home and hide from her parents, and petitioners' efforts to assist her. The original claim, in trial court, was based on the theory that respondent Robin George was brainwashed into accepting the religion through such "psychologically damaging" (31 RT 5937) religious practices as vegetarianism, monastic living, early morning devotions, chanting, and belief in reincarnation. Because of these practices, according to the theory at trial, Robin's conversion and decision to live in a temple monastery (ashram) amounted to

"false imprisonment." This extraordinary and patently unconstitutional theory is summarized by the court below at Pet. App. 25a-26a. During trial, respondents' counsel told the jury that all the other claims were "hogwash" (44 RT 8526) if this false imprisonment claim were not accepted.

The Court of Appeal reversed the false imprisonment claim, but sustained the parents' derivative claims of libel and emotional distress, including very substantial punitive damages. Petitioners ask this Court to review that decision because of constitutional errors that have become all-too-common in emotional distress tort suits against unpopular and unorthodox religious groups.

1. First we will address the effect on this petition of this Court's actions in two recent cases.

a. Since the petition for certiorari was filed in this case, this Court granted the petition in *Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279. The petitioner in *Haslip*, an insurance company, is challenging a judgment of $1.04 million in punitive damages for alleged fraud. The due process challenge to the punitive damages award in this case is substantially similar to that presented by petitioners in *Haslip*. At a minimum, therefore, this case should be held, pending the Court's decision in *Haslip*.

Notwithstanding the Court's decision to reach the punitive damages issue in *Haslip*, plenary review is still warranted in this case, for two reasons. First, in addition to the punitive damages question, this case presents First Amendment issues of great importance, especially to the small, unconventional religions that are the most frequent victims of tort actions for non-physical religious harms. Even if this Court resolves the punitive damages question in *Haslip* in a manner that supports relief for petitioners here, that would neither moot this case nor eliminate the need for review of the other issues it presents.

Second, this case would provide a useful complement to *Haslip* on the punitive damages issue. Not only are the facts and the charge to the jury somewhat different, but more importantly this case raises an additional constitutional basis for controlling punitive damages when they are imposed in

connection with First Amendment protected activity. This Court might conclude that the need for protection against arbitrary or excessive punitive awards is greater in the case of unconventional speech or religious beliefs than in the case of a commercial corporation.

b. In *Employment Division v. Smith*, No. 88-1213, 58 U.S.L.W. 4433 (Apr. 17, 1990), this Court held that the Free Exercise Clause does not require the government to exempt a religious believer from compliance with a generally applicable law, not passed for the purpose of suppressing religious practices, on the ground that the law "requires (or forbids) the performance of an act that his religious belief forbids (or requires)." *Id.* at 4435. That holding does not affect the petition in this case. Petitioners are not seeking any exemption from a generally applicable law. Rather, we are challenging an individualized determination by the jury that petitioners' religious practices, along with conduct committed in the course of assisting a convert in the practice of her religion, are "outrageous" and subject to civil penalty.

The petition did not rely on, or even cite, this Court's free exercise exemption cases, such as *Sherbert v. Verner*, 374 U.S. 398 (1963), or *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the reach of which may have been affected by *Smith*. Rather, the petition relies on this Court's decisions providing substantive and procedural safeguards for free speech and free press in the context of tort litigation – including *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Our argument is that those protections should be extended to the free exercise of religion (Pet. 10). This argument is unaffected by the holding in *Smith*.

2. Perhaps recognizing the weakness of their original claim of psychological coercion, respondents have combed the record for a different basis on which to defend the judgment below. In their Brief in Opposition (at 5), respondents now explain that "Petitioners resorted to threats against Robin's life" and that the alleged emotional injury to her parents was caused by the "impossible choice" they faced between

"risk[ing] her life" and ending their struggle to persuade her to abandon her religion. As even a casual examination of the opinion below will demonstrate, however, respondents' claim of emotional distress was not based on any such dilemma. In the section of the opinion called "Intentional Infliction of Emotional Distress As to Marcia," the court stated:

> The essence of the actionable conduct here was the conspiracy among defendants and other ISKCON agents to assist Robin in running away and to conceal her from her parents, which they knew was likely to cause the Georges severe emotional suffering. Feigned ignorance was only one aspect of this reprehensible activity. The purchase of plane and bus tickets, disguises, fake photographs, fraudulent letters and arguably the libelous "Official Position" news release (see *ante*, pp. 757-758) were all part and parcel of the conspiracy and provide a more than adequate basis for [the emotional distress claim].

Pet. App. 39a-40a (footnote omitted).[1] If the judgment on the emotional distress claim rested in any part on violence or threats of violence against Robin, the Court of Appeal would surely have mentioned it. To the contrary, the court stated unambiguously that there was "no threat of force of any kind in this case" (Pet. App. 28a).[2] Respondents' repeated charges

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[1] Petitioners' principal objection to the court's description is that, with the exception of the "Official Position," all of the conduct described was either performed or instigated by Robin. As the court noted elsewhere in its opinion, "there was every objective indication that Robin actively sought defendants' assistance and fully cooperated in their efforts to hide her from her parents." Pet. App. 36a n.24. We believe plaintiffs' counsel had it right when he told the jury at trial: "if there was no false imprisonment . . . that means that Robin decided to run away from home and torment her parents and it's all her fault anyway. It just wouldn't be fair to find against the defendants in [these] circumstances." 44 RT 8526-27, quoted at Pet. App. 23a n.15.

[2] In support of their allegation of threats, respondents cite to Marcia George's uncorroborated testimony that certain unidentified persons told

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that petitioners "abduct[ed]" Robin George (Br. in Opp. 30), held her in "bondage" (*id.* at 5), and restrained her "freedom" (*id.*) are not only absurd on the evidence in this case (see Pet. App. 25a-26a n.17 for Robin's own testimony to the contrary); these charges are – to borrow respondents' language – "misleading and dishonest" (Br. in Opp. 2).

3. Respondents contend (Br. in Opp. 5-11) that several of the questions presented by petitioners were not adequately preserved in the courts below.

a. Respondents first claim (Br. in Opp. 7-8) that the second question presented – whether the imposition of civil liability on a religious body may be sustained where the jury instructions, pleadings, argument, and testimony defined the tort as encompassing constitutionally protected as well as unprotected activity – was not properly raised. While it is true that the Court of Appeal stated that this issue was raised for

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Marcia and Jim George that "if we didn't stop picketing, we may never see our daughter alive again" (5 RT 806). The only proven connection to any of the defendants in this case was that respondent Richard was within earshot and did not take affirmative steps to disavow the comment. See *id.* at 805-06 (establishing that Richard was within earshot of the speaker). Even that testimony was admitted, over hearsay objections, solely for the purpose of proving that Richard was lying when he stated he did not know where Robin was. *Id.* at 795. Plaintiffs' counsel expressly informed the trial court during deliberations over admissibility: "Additionally, you may keep in mind, I've sort of abandoned the idea of putting in evidence at this point of the stress that was placed on Mr. George" (*id.*).

It may help to put respondents' unsubstantiated charges of violence into perspective to note that according to other evidence in the case, Mr. George threatened Richard's two-year-old son with violence on two different occasions at about the same time (16 RT 3090, 3097-98) and engaged in other threatening and abusive behavior (*e.g.*, 16 RT 3081, 3090-98, 37 RT 7135). The only violence committed against Robin during the entire course of this unfortunate saga was when her parents struck her, hosed her down, chained her to the toilet at night, and burned her holy books. Pet. App. 10a-11a, 6 RT 962.

the first time on appeal (Opp. at 25-26),[3] the court nonetheless "assum[ed] the question is properly before us" (Pet. App. 42a) and decided the question on the merits in a six-paragraph portion of the opinion (*id.* at 42a-43a). The federal question is therefore properly presented for this Court's review. See *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (invoking the " 'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided' "), quoting *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). See also *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 754 n.2 (1985) (plurality opinion); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959).[4]

b. Second, respondents assert that the first question – whether the First Amendment prohibits the imposition of common law tort liability for intentional infliction of emotional distress on the basis of religiously motivated acts by church officials, in the absence of a finding of actual malice manifesting an intent to inflict harm on the plaintiff – "was **never** raised by Petitioners in the courts below" (Br. in Opp. 8 (emphasis in original)). Therefore, they say, "[i]f this Court accepts this issue for review, it will be forced to conduct its examination of the record without the benefit of a jury's factual findings or the intermediate appellate court's legal analysis of their sufficiency" (*id.*).

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[3] In fact, the issue was first raised in Appellant's Supplemental Brief Re Molko v. Holy Spirit Association, at 13-14 – not at oral argument. Respondents filed a 23-page supplemental brief in response.

[4] Contrary to respondents (Br. in Opp. 8), petitioners' counsel did not "actually conced[e] that the evidence at trial otherwise supported a cause of action for intentional infliction of emotional distress." As the Court of Appeal's discussion of petitioners' sufficiency of the evidence argument amply demonstrates (Pet. App. 38a-40a), that question was hotly disputed. Counsel simply argued that the emotional distress claim must be overturned on constitutional grounds even on the assumption that the evidence, untainted by constitutional error, would support the cause of action.

As noted in the petition, however (at 8), this issue was in fact raised in petitioners' briefs in the Court of Appeal and dealt with by that court. In a section of their appellate briefs replete with references to the First Amendment, petitioners contended that the cause of action for intentional infliction of emotional distress

> is available only where [the defendant's conduct is] *calculated to cause* and actually caus[es] emotional distress so severe 'that no reasonable man in a civilized society should be expected to endure it.' As a matter of law – *constitutional* and decisional – defendant's conduct vis-a-vis the Georges does not meet these criteria.

Richard Br. at 3-4 (emphasis added, citations omitted); see also Reply Br. at 59-60.[5] This is essentially the same argument that is now made, in slightly different terms, in the first question. "Actual malice manifesting an intent to inflict harm" is not significantly different from conduct "calculated to cause severe emotional distress."

Without raising any objection to the manner in which the issue was preserved or raised, the Court of Appeal held that liability could be predicated on the mere knowledge that petitioners' conduct "was likely to cause the Georges severe emotional suffering" (Pet. App. 39a). This holding leaves no ambiguity: liability may be imposed even if the defendant had no purpose or motivation to inflict harm on the plaintiff. In any event, petitioners ask this Court not to "conduct [an] examination of the record" (Br. in Opp. 8), but simply to determine whether the legal standard for liability under California law comports with the requirements of the federal Constitution.

c. Finally, there is no doubt that petitioners raised both First Amendment and Due Process Clause objections to the punitive damages award. See Pet. 8. Respondents now complain that we have set forth those claims with "great specificity" in the petition (Br. in Opp. 9). Where the legal basis for the federal constitutional challenge is set forth clearly in the

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[5] Each of the defendants adopted the others' appellate briefs by reference, as was permitted by the Court of Appeal.

lower court, however, it is not a bar to Supreme Court review that the precise legal argumentation in support of that challenge is clarified in the Supreme Court. *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899).

4. The bulk of the brief in opposition (at 11-30) is devoted to a discussion of the merits. For the most part, petitioners are content to rest on their discussion of these issues in the petition. At most, respondents' arguments, if accepted, might provide some reason to affirm a portion of the judgment on full review by this Court; they do not suggest that the issues are unimportant, easily resolved, or otherwise unworthy of this Court's consideration.

In two respects, however, the brief in opposition may create the erroneous impression that the dispositive questions in this case are idiosyncratic to these petitioners. First, respondents argue (Br. in Opp. 11-17) that petitioners' conduct was not religiously motivated and is therefore not protected by the First Amendment. This is largely a restatement of the position respondents take in their own petition, No. 89-1398, and we rely on our answer there. Br. in Opp. in No. 89-1398, at 13-15.[6]

Second, they suggest that petitioners somehow "waived their right" to challenge the excessiveness and arbitrariness of the punitive damages because they resisted discovery of their net worth during the early stages of the trial. Br. in Opp. at 22-24. Respondents neglect to point out that California procedure does not allow pretrial discovery into a defendant's net worth. See Pet. App. 86a (trial court ruling); Cal. Civil Code § 3295. Once the issue could be raised, late in trial, the trial

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[6] At page 13 n.10, respondents provide a new string of citations to the record in purported support of their assertion that "Petitioners testified that they were motivated by purely secular feelings" and "explained away their malicious misdeeds as simple transgressions of a youthful membership." We have examined each of the pages cited by respondents, and find absolutely no support for their assertion. For example, the reference to youthful transgressions comes from respondent Richard's statement that "in those early days of the movement we, being young ourselves, . . . we were very spontaneous in our religious missionary activity." 16 RT 3128. That is a far cry from stating that the motivations were "purely secular."

court "declined to litigate the financial worth of the defendant" (*id.* at 87a) on the ground that such litigation would "require either a recess of many months to permit discovery or to try the issue before the jury which would require several additional weeks of trial" (*id.* at 86a).

We are at a loss to understand why this sequence of events should be thought to preclude petitioners from raising otherwise preserved constitutional challenges to an excessive and arbitrary punitive damages judgment. If respondents' position were accepted, it would effectively nullify the protections of California procedure, which are intended to shield defendants in punitive damages actions from unnecessary or premature intrusion into their financial affairs.

## CONCLUSION

For these reasons, and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted.

MICHAEL W. MCCONNELL
*Counsel of Record*
ANDREW L. FREY
THOMAS C. BERG
MAYER, BROWN & PLATT
190 S. La Salle St.
Chicago, IL 60603
(312) 701-7201

EDWARD MCGLYNN GAFFNEY, JR.
1149 S. La Jolla Ave.
Los Angeles, CA 90035
(213) 934-8307

DAVID LIBERMAN
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
(213) 277-9288

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